



STATE OF NEW JERSEY
Board of Public Utilities
Two Gateway Center
Newark, NJ 07102
www.bpu.state.nj.us

IN THE MATTER OF THE JOINT PETITION OF UNITED)	<u>PROVISIONAL ORDER ON</u>
TELEPHONE OF NEW JERSEY, INC. D/B/A SPRINT)	<u>MOTION TO COMPEL</u>
AND LTD HOLDING COMPANY FOR APPROVAL	
PURSUANT TO <u>N.J.S.A. 48:2-51.1</u> AND <u>N.J.S.A. 48:3-</u>)	DOCKET NO. TM05080739
10 OF A CHANGE IN OWNERSHIP AND CONTROL)	

SERVICE LIST ATTACHED

BY COMMISSIONER CONNIE O. HUGHES:

This matter has been opened to the Board of Public Utilities ("Board") by the filing of a motion to compel by the Office of the Ratepayer Advocate ("Ratepayer Advocate"), seeking to require United Telephone of New Jersey, Inc. d/b/a Sprint and LTD Holding Company (collectively, "Petitioners") to respond to a number of discovery questions propounded by the Ratepayer Advocate in conjunction with the proposed spin-off of United-NJ. Upon receipt of the motion, a schedule was developed to ensure timely submissions of responsive papers, which schedule was met by all parties involved.

The Ratepayer Advocate, in its motion of November 3, 2005, claims that it served upon the Petitioners an initial set of fourteen questions on October 12, 2005. Further, the Ratepayer Advocate claims that the Petitioners, on October 17, 2005, objected to five of the requests, RPA-1, RPA-5, RPA-8, RPA-9 and RPA-14, and to the instructions. On November 1, 2005, according to the Ratepayer Advocate, the parties conferred by telephone to attempt to reach an amicable solution to the discovery issues, but without success. This motion followed.

The Ratepayer Advocate notes that the Board must consider in this change of ownership and control, pursuant to N.J.S.A. 48:2-51.1, the impacts upon 1) competition, 2) the rates of ratepayers affected by the acquisition of control, 3) the employees and 4) the provision of safe and adequate service at just and reasonable rates. Likewise, claims the Ratepayer Advocate, the Petitioners must answer discovery requests "if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." N.J.A.C. 1:1-10.1(b). Within this framework, asserts the Ratepayer Advocate, RPA-1, RPA-5, RPA-8, RPA-9 and RPA-14 should be answered, and the objection to the instructions should be denied.

Specifically, the Ratepayer Advocate states that the Petitioners have objected to the instructions that ask for the identification of the person or persons providing the information in each response. The Petitioners have instead indicated that they will identify the responding witness or witnesses either in the response or otherwise prior to the hearing. The Ratepayer Advocate

indicates its belief that this approach is unacceptable, as the Ratepayer Advocate and other parties might be disadvantaged by the failure to disclose the sponsoring witness or witnesses as soon as the responses are provided, rather than at some time prior to hearing. As such, the Ratepayer Advocate calls for a requirement by the Board that the sponsoring witness or witnesses be provided immediately with the responses, and not at some later date.

Petitioners, in their response of November 10, 2005, note that the underlying purpose of discovery is to provide information which tends to support or undermine positions, but which does not come close to the "unfettered" approach claimed by the Ratepayer Advocate. Instead, claims Petitioners, the Ratepayer Advocate is seeking to expand the scope of the proceedings beyond that set by the Board in the October 27, 2005 Prehearing Order. Further, notes the Petitioners, the transaction at issue is the separation of United-NJ from its current parent, Sprint Nextel Corporation and the formation of a new company with LTD as the parent. Thus, according to the Petitioners, within this transaction, the Board's analysis is designed to focus upon the impact upon the regulated public utility and not upon former parent or sibling corporations. The questions propounded by the Ratepayer Advocate, in the opinion of the Petitioners, are not, and can not, be designed to elicit facts that support or undermine positions as the nature of the non-utility former corporations is not at issue. Furthermore, the Petitioners take objection to the demand by the Ratepayer Advocate that all discovery responses must have a sponsoring witness at this time. As the Petitioners will not be certain of the sponsoring witness until the filing of rebuttal testimony, the selection of the appropriate party to answer questions during cross-examination is premature at this time, and runs counter to prior experience. As such, the Petitioners call for the denial in full of the Ratepayer Advocate's motion.

The Ratepayer Advocate, in its reply, reasserts its statutory role and its desire to develop the record in a full and complete manner, and claims that the Petitioners are raising the "red herring" of relevancy and admissibility such that the Board should be cautious in its review. It further claims that the Petitioners are attempting to unreasonably limit discovery and compress the schedule so as to minimize scrutiny of the overall process. Because the proposed entity, LTD, has not yet been formed, and because the "beneficial interest of United-NJ is held by Sprint Nextel," the Board must, asserts the Ratepayer Advocate, look beyond the regulated public utility to the parent and sibling companies. The core issue, as positioned by the Ratepayer Advocate, is the question of whether the surviving entity will be able to deliver the same or better service than its customers now enjoy. The Ratepayer Advocate claims that it is necessary to review the pre-merger and post-merger structure of United-NJ and LTD in order to understand the nature of the spin-off. Furthermore, the Ratepayer Advocate calls preposterous the claim that Petitioners are unable to provide the identification of the individuals providing discovery responses. As such, the Ratepayer Advocate calls for the immediate identification of the individuals responsible for the discovery responses provided.

RPA-1 requests full and complete copies of all plans for the integration of Sprint and Nextel following merger approval by the Federal Communications Commission ("FCC"). Petitioners, in their objection, claim that the information is irrelevant as the merged entity will not be the parent of the New Jersey company and thus have no impact upon the change in control at issue here. The Ratepayer Advocate claims that the information is "fundamental" to gaining a proper understanding of the structure of LTD and United-NJ pre and post merger, including issues of how the long distance services and wireless services are provided and under what price, terms and conditions. This information, claims the Ratepayer Advocate, is necessary and relevant to evaluate "whether post spin off agreements reflect the anticipated synergy benefits resulting from combining Sprint and Nextel and otherwise result in just and reasonable rates for LTD that

in turn affect the ultimate rates charged to ratepayers in New Jersey.” Additionally, asserts the Ratepayer Advocate, the information sought is intended to test whether the company will be paying more post merger for the same or similar services currently obtained from Sprint. Likewise, alleges the Ratepayer Advocate, the requested information provides a backdrop to the comprehensive investigation and analysis of the affiliate transactions contemplated by the change of control, as required under N.J.S.A. 48:2-51.1. Finally, such information is relevant to assessing whether the Transition Services Agreements and the rates charged therein by and between Sprint and LTD are just, fair and reasonable. Accordingly, the Ratepayer Advocate calls upon the Board to direct that the Petitioners provide full and complete responses to RPA-1.

Petitioners, in their response, note that RPA-1 calls for an overly broad category of “all plans for integration” as well as asking for details of a company that is not a party to the proceeding and which will not be associated with the regulated entity if this Petition is approved. Further, Petitioners point to the justification provided by the Ratepayer Advocate, and the assertion that pre and post merger information of Sprint and Nextel is necessary for the review of United-NJ, as proof that the Ratepayer Advocate is seeking information well beyond the scope set for this proceeding, as the pre-merger information has no basis on the future costs and the post-merger information deals with companies that are no longer associated with the regulated entity. As such, the Petitioners call for the denial of the Ratepayer Advocate’s demand for a response on this request.

The Ratepayer Advocate, in its reply, claims that the information sought relates to the issue of what LTD is going to receive and what it is entitled to receive as the result of the merger. The Ratepayer Advocate claims that the cost and benefits of the merger must be equitably shared with the wireline operations and be reviewed by the Board as part of this spin-off. In light of Sprint Nextel public comments, claims the Ratepayer Advocate, the objection is frivolous.

RPA-5 requests documents related to the preparation of the S-1 registration statement, including any draft S-1 statements, or documents prepared for use in the drafting of the S-1 registration statement. Petitioners object based upon a claim that the request is overbroad and covered by the attorney-client privilege. In response, the Ratepayer Advocate claims that it is not seeking any legal advice given by counsel in preparation of the S-1 registration statement, but “only seeks factual and financial information that was used in the preparation of any S-1 or drafts.” This request, asserts the Ratepayer Advocate, is designed to support or undermine the statements made in the Petition as to the spin-off’s prospects going forward, and is necessary as the final S-1 will likely be submitted to the Securities and Exchange Commission after the Board has concluded this review. The Ratepayer Advocate claims that it “has the right to see any documents that will be used, have been used, or are identified for use in the preparation of S-1 filing [sic]” such that the Board should require the disclosure.

Petitioners, in their response, claim that the request is overly broad as it effectively requests all books and records for Sprint Nextel without providing any foundation for this request. Further, Petitioners assert that the preparation of the S-1 involves considerable advice, guidance and work product with the Petitioners’ attorneys such that the production of drafts would be in violation of the attorney-client privilege. Petitioners reconfirm the prior commitment to provide the S-1 as soon as it is filed with the SEC, but continue to decline to provide the working drafts prior to that final document is made public.

The Ratepayer Advocate, in its reply, states that the implication of the request was not to violate the attorney-client privilege, but instead should be limited to the documents kept in the ordinary course of business. Further, as noted by the Ratepayer Advocate, Petitioners claim that the S-1

is being drafted but do not provide an expected date of filing such that the Ratepayer Advocate believes that the Petitioners have no intention of providing the S-1 to the Board for review. Nevertheless, the documents have been pulled together and prepared such that the Ratepayer Advocate claims should be provided for discovery. As such, the Ratepayer Advocate insists that the information should be provided.

RPA-8 requests full and complete copies of any projections going forward of the balance sheets, income, expense, profit and loss statements, results of operations, gross margins and net income, of the combined company for each line of business, for the Company, and for United NJ. Petitioners have objected to this request, claiming that the information is irrelevant as the competitive local exchange carrier ("CLEC") portion of the business are not part of United-NJ and will not be affiliated with LTD. The Ratepayer Advocate asserts that, while Petitioners have declined to include the CLEC as part of this change of control, the Ratepayer Advocate must still have the opportunity to assess if the new company will be adversely impacted by the separation from the CLEC and thus impact upon the rates charged to subscribers. Likewise, the information will, according to the Ratepayer Advocate, have a direct impact upon the issue of allocation of merger synergies, and thus is directly designed to lead to discoverable evidence. As such, the Ratepayer Advocate calls upon the Board to require Petitioners to respond to this request.

RPA-9 requests full and complete copies of any projections going forward of the balance sheets, income, expense, profit and loss statements, results of operations, gross margins and net income, for the CLEC portion of Sprint's business. Petitioners assert the same objection as to RPA-8, noting that the request is irrelevant. The Ratepayer Advocate asserts that the combined Sprint/Nextel company may use the CLEC portion of the business to provide interconnection to the public switched telephone network on an exclusive basis, and that this could impact upon the apportionment of costs and benefits.

Petitioners, in response, assert that both RPA-8 and RPA-9 are overly broad and beyond the scope of this proceeding. The CLEC portion of the business is, according to Petitioners, neither a party to this proceeding nor a part of the operations of United-NJ. United-NJ is not in the CLEC business, will not be transferring any assets or customers, and will not in any way be associated with United-NJ following the spin-off. As such, this information is not and can not be considered relevant to the current Petition.

The Ratepayer Advocate, in reply, claims that these questions are necessary to allow the Board to review the transaction to see if LTD would be a more viable competitor with or without the current CLEC operations. As such, the information is necessary and the Ratepayer Advocate calls upon the Board to require its disclosure.

RPA-14 requests copies of all discovery exchanged in those jurisdictions in which a petition for approval of the spin-off has been filed, including any dispositive orders on the respective petitions. Petitioners object on the grounds of relevance and that the request is overbroad and burdensome, but that the Petitioners would provide a list of those questions asked in those other jurisdictions. The Ratepayer Advocate asserts that it has the right to see discovery responses from other states and claims that the parties in the last two merger cases provided similar information, and that the information is reasonably calculated to provide admissible evidence. Accordingly, the Ratepayer Advocate calls upon the Board to require the production of this information.

Petitioners, in response, state that this request "is designed to cast the widest possible net with

no concern for even minimal relevance or the burden placed on Petitioners.” Discovery produced in other jurisdictions is not necessarily relevant to the New Jersey proceeding, and the Ratepayer Advocate has failed to make, according to the Petitioners, any proffer as to relevancy of what is multiple thousands of pages of discovery. Further, notes the Petitioners, the compromise offered, whereby Petitioners will provide the questions asked in those other jurisdictions and will determine its response on a question-by-question basis if and when the Ratepayer Advocate re-asks those questions it deems relevant, is a reasonable balance between the need for discovery on the part of the Ratepayer Advocate and the burden upon the Petitioners. As such, Petitioners call for the denial in full of the Ratepayer Advocate’s motion to compel.

The Ratepayer Advocate, in its reply, claims that the offer of the Petitioners would improperly limit the right of the Ratepayer Advocate to obtain information. Similar requests were made in prior merger cases, and information provided was used in the hearings in those cases. Further, claims the Ratepayer Advocate, the responses should not be burdensome as they are already in paper or electronic format. As such, the Ratepayer Advocate calls upon the Board to order Petitioners to fully respond to the demand.

DISCUSSION

Discovery before an agency such as the Board is controlled by the Uniform Administrative Procedure Rules, specifically N.J.A.C. 1:1-10.1 et seq. The purpose of discovery, as set out by N.J.A.C. 1:1-10.1 is to provide litigants access to “facts which tend to support or undermine their position or that of their adversary.” Likewise, discovery is appropriate “if the information sought appears reasonably calculated to lead to the discovery of admissible evidence,” N.J.A.C. 1:1-10.1(b), and the test for the judge in reviewing a discovery motion requires the judge to “weigh the specific need for the information, the extent to which the information is within the control of the party and matters of expense, privilege, trade secret and oppressiveness,” N.J.A.C. 1:1-10.1(c). Thus, the Ratepayer Advocate is correct in its assertion as to the fundamental nature of discovery and that the overall nature of the review includes, but is not limited to, consideration of the impacts listed in N.J.S.A. 48:2-51.1.

Within that framework, I HEREBY FIND as follows:

In terms of the directions, and in line with the Rules of Court as brought into the rules of the Office of Administrative Law, petitioners shall, from this point forward, identify a supporting witness or witnesses for each discovery response with the response. For all questions already submitted, the sponsoring witness shall be identified within 5 business days of the date of this Order.

RPA-1 as written, is overly broad and would necessitate the production of information that falls outside the scope of this proceeding. For example, to answer this question as currently constructed, information with respect to such plans as the elimination, consolidation or reorganization of retail cellular phone stores and kiosks, which are far afield from this matter, would need to be produced. The Ratepayer Advocate’s assertion as to the need for this information, to determine the impact upon rates, does not flow from the request for information. The question must be tailored to address the matters at issue.

RPA-5 seeks the drafts and, based upon the recast provided in the Ratepayer Advocate’s reply, associated documents related to the production of the S-1 to be filed by the Petitioners. Petitioners assert that drafts would be in violation of the attorney-client privilege, and the

Ratepayer Advocate seems to agree with this assertion. Instead, the Ratepayer Advocate now seeks the documents that will form the foundation of the S-1. This request, however, likewise runs afoul of the attorney-client privilege in this matter, as the selection process of the documents used to form the basis of the S-1 is also a matter for the attorney-client privilege. The Ratepayer Advocate is free to request those documents it believes are relevant, but casting its request in terms of those documents that Petitioners are using to develop a formal submission is inappropriate.

RPA-8 and RPA-9, seeks information on the CLEC portion of Sprint's business. The CLEC portion of the business falls outside the elements of the spin-off covered by the Petition; however, since this entity is currently regulated by the Board and the information should be readily available, I will direct petitioners to respond to RPA-8 and RPA-9 within 5 business days of the date of this Order.

Finally, RPA-14 requests copies of all discovery exchanged in other jurisdictions. This request is, upon its face, overly broad, as there is no assurance that information relevant and designed to elicit relevant evidence in other jurisdictions is likely to have the same impact in a New Jersey proceeding. Petitioners have offered to provide a full list and to provide appropriate responses to individual requests, but objects to the overall mass submission, and this offer is reasonable under the circumstances.

Accordingly, based upon the above, I HEREBY ORDER that the motion to compel is APPROVED in part and DENIED, in part, and FURTHER ORDER that Petitioners shall be bound by their offer to provide a full list of the discovery propounded in other jurisdictions and to provide individual discovery responses as requested by the Ratepayer Advocate, subject to standard discovery objections, with this discovery to be concluded as soon as possible, and in no case later than December 16, 2005.

This provisional ruling is subject to ratification or other alteration by the Board as it deems appropriate during the proceedings in this matter.

DATED: **11 - 23 - 05**

BY:

A handwritten signature in black ink, appearing to read "Connie O. Hughes", written over a horizontal line.

CONNIE O. HUGHES
COMMISSIONER

SERVICE LIST

Mark L. Mucci, Esq.
Colleen A. Foley, Esq.
Saul Ewing LLP
One Riverfront Plaza
Newark, NJ 07102

Donald Scarinci, Esq.
Andrew Indeck, Esq.
Scarinci and Hollenbeck, LLC
1100 Valley Brook Avenue
Lyndhurst, NJ 07071

Mark Trinchero, Esq.
Davis, White, Tremaine
1300 S.W. Fifth Avenue, Suite 2300
Portland, OR 97201

Zsuzsanna E. Benedek, Esq.
Sprint
240 North Third Street, Suite 201
Harrisburg, PA 17101

Seema M. Singh, Esq.,
Ratepayer Advocate and Director
Paul Flanagan, Esq.
Assistant Director
Christopher White, Esq.
Deputy Ratepayer Advocate
Jose Rivera-Benitez, Esq., Esq.
Assistant Deputy Ratepayer Advocate
Division of the Ratepayer Advocate
31 Clinton Street
P.O. Box 46005
Newark, NJ 07101

Anthony Centrella, Director
Division of Telecommunications
James Murphy
Competitive Services & Mergers
Lawanda Gilbert, Esq.
Counsel's Office
Rocco Della-Serra
Division of Telecommunications
Julie Huff
Division of Telecommunications
New Jersey Board of Public Utilities
Two Gateway Center
Newark, NJ 07102

Steven P. Weissman, Esq.
Weissman & Mintz, LLC
One Executive Drive
Suite 200
Somerset, NJ 08873

Sumanta Ray
Research Economist
CWA District One
80 Pine Street, 37th Floor
New York, NY 10005

Debbie Goldman
Research Economist
CWA, AFL-CIO
501 Third Street N.W.
Washington, D.C. 20001

Debbie Goldman
Research Economist
CWA, AFL-CIO
501 Third Street N.W.
Washington, D.C. 20001

William K. Mosca, Jr., Esq.
Wolf, Block, Schorr & Solis-Cohen LLP
101 Eisenhower Parkway
Roseland, NJ 07068

Frederick C. Pappalardo, Esq.
AT&T Communications of NJ, L.P.
340 Mt. Kemble Avenue
Morristown, NJ 07962

Todd Steadman
Jeff Slutzky
Deputy Attorneys General
State of New Jersey, Division of Law
124 Halsey Street
P.O. Box 45029
Newark, New Jersey 07101